IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPEAL NO. 819 OF 2001

Sandeep Rameshrao Thorat]
Age 29 yrs. Occ:]
Residing at Shram-Saphalya]
Baungalow, Shikharewadi,]
Nashik Road, Dist.Nashik]
(At present serving the]
sentence of Imprisonment for]
life in Jail at Nasik Central]
Prison, Nashik Road,]..Appellant
(Ori.Accused)

Vs.

State of Maharashtra]
(At the instance of]
Nashik Road Police Station]
Nashik]..Respondent

....

Shri S.B. Shetye, Advocate for the appellant.
Smt. Usha Kejriwal, APP for the respondent State.

....

CORAM : N.V.DABHOLKAR
AND
SMT.V.K.TAHILRAMANI,JJ.

DATE OF RESERVING
JUDGMENT : JANUARY 20,2006

DATE OF PRONOUNCING
JUDGMENT : JANUARY 23,2006

ORAL JUDGMENT :

(PER DABHOLKAR, J.)

1. This appeal under section 374 (2) of the Code of Criminal Procedure, 1973 challenges the

judgment and order dated 17.8.2001 delivered by 1st Ad-hoc Additional Sessions Judge, Nasik in Sessions Case No. 25 of 2000. The appellant is aggrieved by his conviction for the offence punishable under section 302 of the Indian Penal Code for which he is sentenced to life imprisonment, by the Trial Court.

2. The incident in question took place on 10.8.1999 at about 8.30 p.m. Admittedly, victim of the incident namely Hema was married to the appellant on 21st May 1998. At the time of incident, the couple was residing in the rented premises owned by Vimal Lohot (PW 1), in the bungalow "Shram Safalya" at Shikhare Wadi, Nasik Road. It is alleged by the prosecution that the appellant used to express suspicion over the character and fidelity of the deceased wife. He was addicted to liquor. On the day of incident, he picked up a quarrel with the wife and he set her on fire after pouring kerosene on her person. In fact, the method with which victim was set on fire, in this matter, is somewhat abnormal. It is alleged that initially accused took off his garments and set those on fire in the passage

between kitchen and bath room. Thereafter he poured some kerosene on the person of the victim and ignited her by taking near the fire that was lit by burning his own clothes. Vimal (PW 1) was the first witness to reach the location. While she was watching T.V. programme at her residence, couple of boys knocked her door and informed her that something was serious in the adjoining flat because they had seen fire in the same. Vimal is the landlady as well as neighbour of the accused. The entrance doors of their flats are separated only be landing platform of the staircase of 4 tiles X 4 tiles. When Vimal knocked the door of the accused, accused himself opened the same and on entry into the flat occupied by the accused, Vimal saw that Hema was standing in the passage between bath room and kitchen and she had suffered burn injuries. In fact, Hema was fully drenched with water and accused went to the bath room and put his hands in a water bucket. The clothes of the deceased had stuck to her burn injuries. There was water spread over the flooring and a plastic bottle was lying nearing the refrigerator in the kitchen. Some ash was also scattered in the corner of the

said passage. In fact, according to Vimal, except face, whole body of the victim was affected by burn injuries.

. Vimal helped Hema to go to living room, made her sit in a chair and covered her by means of a Chaddar. Vimal also suggested Hema if she would like to inform the occurrence to some relatives, when the victim gave couple of telephone numbers. It is admitted position that these were the telephone numbers of parents of Hema and Manisha - sister of accused.

. By the time Vimal returned to location after giving telephonic message, Manisha had already reached there. The two decided to take Hema to a hospital. Vimal arranged for a rickshaw, by which time Manisha had put on a gown on the person of Hema. Vimal and Manisha took Hema as also the accused to Sujata Birla Hospital at Nasik Road. Hema survived for nearly 10 to 11 days after the incident. While under treatment, she expired on 21.8.1999.

. The dying declaration of Hema, as recorded by

Special Executive Magistrate Balasaheb Mate (PW 7) on 11.8.1999 between 00.05 hours to 00.20 hours (at a time just past midnight between 10th and 11th August 1999) and which is at Exh.40, was treated as first information report by Nasik Road Police Station. Jagannath Pawar (PW 10) then P.I. Nasik Road Police Station had also recorded elaborate statement of victim Hema. After completion of investigation, Shri Pawar filed charge sheet in the Court of Magistrate and on committal, the trial ended in conviction, which is under challenge.

3. Apart from landlady Vimal (PW 1), Executive Magistrate Balasaheb Mate (PW 7) and Investigation Officer Jagannath Pawar (PW 10), prosecution has examined seven more witnesses. Sudhakar Bendre (PW 3) is father of the victim. Manisha Shejwadkar (PW 8) is her sister and Nitin Bendre (PW 9) is her brother. All of them claimed to have spoken to Hema when they reached the hospital upon receiving telephonic message, presumably from Vimal (PW 1).

. Dr. Hemal Gachharajani was present when P.I.

Pawar recorded statement of the victim (Exh.46) and she had certified fitness of the patient to make a statement. Bharat Rokade (PW 5) was the other Medical Officer attached to Sujata Birla Hospital where victim was admitted. He was present when she was admitted and he was in-charge of Intensive Care Unit where she was admitted when her statement was recorded by Special Executive Magistrate. Through his evidence, prosecution has procured production of case papers regarding Hema and defence has obtained on record history of the injuries. These case papers are at Exhs. 33 to 36 and are of significant importance when we consider the merits of the prosecution case.

. Dr. Madhukar Shankhpal has carried out post mortem and he has opined that death of Hema was caused because of cardio respiratory failure due to shock, due to burn injuries.

. The remaining witness Mohan Navale is a panch witness and panchanama of the spot was drawn in his presence.

4. So far as defence of the accused is concerned, if we refer to his statement under section 313 of the Code of Criminal Procedure, he has not utilised the last question, "Do you want to say anything?" to raise any positive defence. However, from the tenor of the cross examination, it is certainly suggested that he extinguished the fire. Impliedly, it is claimed that he did not set the victim on fire. As will be seen from the discussion later on, theories of attempt to commit suicide as also accident are tried to be relied upon and the learned Trial Judge, to some extent, has taken strong adverse view of this attempt to rely upon duel theories. He has admitted that a fortnight prior to his marriage, his father had suffered heart attack and also having undergone by-pass surgery, four moths after the marriage. It is admitted that one month after the marriage, couple stayed with the parents at Dhule. (Admittedly, both the families originally belonged to Dhule). The rented premises were secured about a year prior to the alleged incident and this was because appellant was serving at Nasik. Admittedly, the couple used to have a trip to Dhule at least alternate

month. The victim Hema had stayed with the parents of the appellant because his father had undergone cataract surgery and she had resumed cohabitation at Nasik Road only a fortnight prior to alleged incident.

. Accused admits entry of Vimal (PW 1) but according to him, she arrived only after the fire was put off. He also admits that upon arrival of Vimal, he had put his hands in a water bucket. Hema giving couple of telephone numbers to Vimal, arrival of sister Manisha and then all four going to Sujata Birla Hospital by a rickshaw, are also admitted facts.

. The allegations of raising suspicion about the character of wife and contents in the dying declarations, are denied as false.

5. On discussing the evidence of Sudhakar (PW 3), learned Trial Judge has arrived at the conclusion that there were cordial relations between the families of deceased and accused since prior to the marriage. The conclusion was arrived at inspite of hesitation on the part of

Sudhakar (PW 3) to accept the same. According to learned Judge, in view of this cordial relationship, which appeared to be continued even after the marriage, father of deceased whenever visited Nasik Road, he also used to visit Manisha (sister of the accused). The father has even attended the function of birthday ceremony of son of Manisha. Even after getting the message regarding Hema having suffered burn injuries, the parents of deceased came to Nasik to see their daughter along with the parents of the accused. According to learned Trial Judge, this cordial relationship clearly indicated that the family of the deceased had no grudge against any of the family members of the accused or reason to falsely inculpate the accused.

. Evidence of the landlady is accepted for arriving at a conclusion that the victim and the deceased were the only family members at the material time. Vimalbai, inspite of being the first person to arrive at the scene, has not spoken anything about kerosene smell at the location or having heard anything from the victim, although admittedly victim was in a

position to speak till the time they boarded the rickshaw for proceeding to the hospital. This situation is explained by the learned Judge by observing that Vimal did not desire to get involved in the incident beyond giving help to the victim.

. In the remaining part of the judgment, the learned Judge has assessed the recorded dying declarations (Exhs.40 and 46) and he has also considered the entries in the case papers. The learned Judge was inclined to believe both the recorded dying declarations and since the entries in the medical papers showed conflicting histories, which included all three modes of suffering burn injuries i.e. accident, suicide and homicide, by relying upon the observations of the Supreme Court in the matter of **Kumar Vs. State (Delhi Administration), (AIR 1987 SC 692)**, the learned Trial Judge arrived at a conclusion that different theories of suicide as well as accident were sought to be floated, obviously to save the accused by those who had brought the patient to the hospital. Having thus believed the recorded dying declarations and having ruled

out the theory of accident, on the basis of the details available in the spot panchanama, because the incident occurred in the passage between kitchen and bath room and not in the kitchen itself, the learned Trial Judge held the death to be homicidal and, therefore, has recorded the impugned conviction.

6. Heard Advocate Shri.Shetye and A.P.P. Smt.Kejriwal for respective parties. In order to limit the length of the judgment, we do not propose to enlist the submissions & but intend to straightway proceed with considering the submissions on merits.

. The learned counsel for the appellant tried to argue that Exhibit-40 must not have been recorded at the hours the same is purportedly recorded i.e. 00.05 to 00.20 hours of 11.8.1999. For that purpose, he has placed reliance upon the entries effected in the progress record maintained by the hospital and more particularly entries effected by Dr.Verma which are at Exhibit-36. He has pointed out that the entries are dated 10.8.1999 commencing from 9.00 p.m.

and the last entry on the page indicated timings 12.20 a.m. It was submitted that Exhibit-36 can lead to an inference that patient was being attended by Dr.Verma right from 9.00 p.m. of 10.8.1999 to past mid-night i.e. 00.20 hours of 11.8.1999. We are unable to agree with such an interpretation. Not only at the last entry, there are timings recorded in couple of more entries on the same page. There is an entry "i/v fluids prescribed 4.5 ltrs. in first 8 hours 9.30 - 5.30 a.m." "2.2 litres 5.30 - 1.30 p.m.". From the trend, it appears that last entry on the last page which is relied upon by the counsel to drive an inference that Dr.Verma being in attendance with the patient till 22.20 a.m., the inference cannot be possible, because this seems to be timing prescribed by the Doctor for administration of injection fortwin-15 mgs i/v. In fact when we read whole entry it also adds "after statement". This is the entry either prescribing the timings or may have been recorded after her statement was recorded by the Special Executive Magistrate Shri.Mate between 00.05 to 00.20 hours. That Dr.Verma must not have been in attendance for 3.5 hours is also evident from

further entries in the progress record. There is entry at 11 p.m. showing the patient to be conscious and afebrile. At 12.0 mid-night similar entry is there. The next entry is at 2.00 a.m. and with each entry there is record regarding blood pressure, pulse etc. Thus, Exhibit-36 does not necessarily lead to an inference that Dr.Verma must have been attending the patient for 3.5 hours or that there was no room for Special Executive Magistrate to visit and record the statement.

7. The learned counsel has placed reliance upon the entries in the clinical record of the patient at several places in Exhibits-33 to 36 and we intend to reproduce these entries for the sake of convenient consideration. Relevant portion at Exhibit-33 reads as follows:

. "Alleged H/O ? Accidental burn at about 7.00 p.m. today" A 24 years female brought by his (her) husband burn over chest/back both hands and both L.L. below knee. Patient giving H/O burn, done by

her husband".

. The relevant entry at page 36 reads thus: "S/B (sent by) Dr.P.D.Verma. Patient brought by husband. History given by same, H/O accidental burns". Exhibits-34 and 35 are letters addressed by Officer in charge of Sujata Birla Memorial Hospital to Nehru Nagar Police Chowky. The intimation appears to have been given because Doctor attending the patient felt the case to be of Medico Legal importance. The first one is the intimation regarding admission of victim Hema as a burn patient and second is the intimation regarding admission of accused Sandeep as a burn patient. The portion of importance in these communications is regarding the details of incident in the column "_____ _____" i.e. the information regarding incident. So far as Hema is concerned, the intimation is as follows: "_____ _____" i.e. at the residence by getting kerosene poured, suffered 45% burns. Similar intimation regarding appellant Sandeep reads as follows: " _____

_____

_____" i.e. at the residence while extinguishing the wife, both arms have suffered burns. At the outset, we may say that entries at Exhibit-33 contained conflicting material. It suggests that husband gave history of accidental burns whereas the patient herself gave history of homicidal burns. Although first part of Exhibit-33 matches with Exhibit-36 and there is no dispute that appellant tried to extinguish the fire, as can be seen from recorded dying declarations, the history of the suicide as informed to the police station conflicts with exonerating history as contained in Exhibits-33 and 36. Exhibits-33 an 36 both histories given by the husband claim accidental burns whereas communication to police station Exhibit-34 suggests an attempt to commit suicide by indicating that victim herself had got kerosene poured upon her person. Since entries at Exhibits-33 and 36 which are exonerating entries, clearly record that the said history was given by husband, that by itself is sufficient to indicate that the same need not be given much weight i.e. story propounded by the appellant-accused

himself. So far as exonerating history as contained in communications to the police station at Exhibits-34 and 35, unfortunately for the appellant, this history conflicts with the exonerating history narrated by the husband and recorded in Exhibits 33 and 36. The conflict must be arising because history as recorded in Exhibits-34 and 35, in all probabilities; is given by Sow.Manisha Shinde (sister of the appellant). Such an inference can be drawn because Manisha is shown as a person having reached the patient to the hospital. We are inclined to concur with the learned trial Judge that exonerating entries as contained in the case papers and the communications of history to the police need not be given much weight in favour of the defence because, the history is not given by the patient and conflict in the history as recorded by husband and his sister is capable of suggesting an attempt to ensure exoneration and safety for the appellant-accused.

. By relying upon the cross-examination of Dr.Rokade (P.W.5), it was submitted by the learned counsel for the appellant; that by the

time Dr.Verma visited the patient, Hema was shifted in the Intensive Care Unit and husband had no access to the same. It is admitted by Dr.Rokade that when Hema was examined by Dr.Verma, he was present, Hema was in I.C.U. at that time, and apart from patient and two Doctors, none else was present. (We may revert to earlier argument propounded by the learned counsel, it was possible for the defence to obtain admission from Dr.Rokade that Dr.Verma was attending the patient right upto 00.20 hours of 11.8.1999 instead of relying upon the entry in Exhibit-36 which was not confronted to any prosecution witnesses to rely upon for the first time during the course of argument. This was not done and we feel fortified in drawing an inference that the said entry cannot suggest the presence of Dr.Verma upto 00.20 hours with the patient and therefore inability of Special Executive Magistrate to record the dying declaration. We have rightly rejected that argument of the learned counsel). If that be so, according to the learned counsel for the appellant, the history as recorded by Dr.Verma at Exhibit-36 must have been given by the patient.

The argument could have been sustained if the history was recorded without a reference to the person as to who gave the history. The entry at Exhibit-36 suggests that patient was brought by husband and history was given by the same person i.e. husband. We also cannot rule out the possibility that Dr.Verma has borrowed the history from initial entry at Exhibit-33 which was recorded by Dr.Rokade, immediately upon the admission of the patient. No doubt, defence tried to blame the prosecution for not having examined Dr.Verma. But prosecution has examined Dr.Rokade who was witness to all the events and if at all defence desired that Dr.Verma had taken history from the patient herself that she suffered accidental burns, it was open for the defence to invite Dr.Verma as a defence witness which it has not dared to do.

8. Learned counsel for the appellant also tried to urge that Dr.Rokade is the person who must have played the mischief by recording inculpatory history at Exhibit-33 just below exonerating history as recorded at the stage of admission.

Such a history must have been added sometime later. For justifying such argument, the learned counsel has pointed out that Dr.Rokade in his examination-in-chief nowhere referred to presence of Dr.Verma. It is alleged that Dr.Rokade deposed in such a fashion as if he was the person attending to the patient and it was only during the course of cross-examination that defence has brought on record that Dr.Verma was the Medical Officer incharge of patient Hema. We are unable to agree with such accusation that there was any attempt on the part of Dr.Rokade of suppression of Dr.Verma being in picture for treatment to Hema. If he was so to attempt, he could have denied suggestion in the cross-examination which he has not. Even about Exhibit-33, we are unable to agree with the accusation levelled against Dr.Rokade by the appellant. Doctor has honestly recorded the history given by both. Entries themselves are eloquent. The first history is given by husband and second one by the patient herself and it is not in dispute that along with victim not only Manisha and Vimal but appellant-accused has also come to the hospital. The doubts which are tried to create against

inculpatory history as recorded in the case papers on the basis of exculpatory history at Exhibits-33 and 36, get cleared and on the contrary doubts arise about exculpatory history, when we refer to Exhibit-34 where Manisha appears to have attempted to save her brother by giving a history of suicide attempt. Unfortunately we do not have on record the material from which this history is borrowed in Exhibit-34 the communication to police. We are therefore, not inclined to accept the submission of the learned counsel that there was any attempt on the part of Shri.Rokade to falsely inculpate the accused by joining hands with the father of the deceased. In fact, we concentrated on Exhibits-34 and 35 because had those communications conveyed history of accident, we could have been in a position to arrive at a conclusion that inculpatory history as recorded at Exhibit-33 must have been inducted after dispatch of communication to police which appears to be at 22.05 hours. Unfortunately for the defence, reference to Exhibit-34 has boomeranged upon it. It can be seen from cross-examination of Dr.Rokade that Exhibits-34, 35 and 36 are brought on record by

the defence during the cross-examination of the Doctor. These documents are picked up from the case papers brought by the Medical Officer from the hospital. The arguments of Shri.Shetye that defence is prejudiced because, these documents were not made available to the defence earlier, is not sustainable. The prosecution did not desire to rely upon these documents, but defence invited those on record.

9. Quite considerable emphasis was laid by the counsel for the appellant on the fact that Vimal does not talk anything about having enquired victim or about having heard anything about the cause of burn injuries from the victim. We are unable to rule out the possibility as considered by the trial Court. Apathy of the individuals to get themselves involved in criminal matters as witnesses and being required to face the police station and the Courts, is by now required to be taken a judicial note. Vimal is one such example. She is willing to render every help to the victim but she is not willing to cross the boundary beyond that. She has described what she saw upon entering into the

house,but she has refused to get herself involved by saying about having heard the incident from the victim. According to her own narration, she had returned to own flat after making the victim sit in chair and by the time, she returned after giving telephonic intimation to Manisha (sister of accused) and parents of the deceased, Manisha had arrived at the scene. Who knows, in presence of Manisha the landlady Vimal did not feel comfortable to interrogate the victim. We are in agreement with the trial Court that merely because there are no details on record such as victim having made immediate disclosure to Vimal, the prosecution story is not required to be discredited.

. Coming to recorded dying declaration, Special Executive Magistrate was challenged by referring to his admission that he was not given written requisition by the police to record dying declaration. It is the claim of the Executive Magistrate that police had come to call him while he was asleep. A reference was made to his admission that the Executive Magistrates are required to maintain a register and record the details of dying declarations recorded by them.

Although Shri.Mate had not come to Court with such a register pointing out an entry taken in the register, he denied the suggestion that entry regarding this dying declaration is not taken in the register maintained by him. On reference to cross-examination, defence has not invited Special Executive Magistrate to produce the register. In the absence of such challenge, the denial by Shri.Mate of the suggestion that he has not taken entry is required to be upheld and will have to draw an inference that he has taken entry of recording of dying declaration of Hema in the register maintained by him. Shri.Mate has deposed of having approached Doctor and having got confirmed from the Doctor that patient was in a condition fit to make a statement and then he recorded the statement. On completion of recording, statement was read over to the patient and her signature was obtained only after she accepted the correctness of recording. On reference to deposition of Police Inspector Pawar (P.W.10), he also claims to have complied with all these formalities while recording the statement of victim (Exhibit-46). On reference to original documents Exhibits-40 and 46, it can

be seen that Dr.Rokade and Dr.Buch (P.W.5 and 6 respectively) have put the endorsement regarding the fitness of the patient before commencement and on conclusion of the statements. Thus, there are no infirmities regarding formalities to be observed while recording dying declaration. Evidence of Shri.Balasaheb Mate is also challenged by putting suggestion that he belongs to Shivsena and he had rendered assistance to P.W.2 Mohan Nawale when Mohan Nawale contested the elections for State Legislative Assembly from Dhule constituency. The suggestion was denied by Shri.Mohan Nawale and there was no such suggestion to Mr.Mate himself. Shri.Mate has recorded dying declaration before 00.20 hours it can safely be inferred that by that time, parents of the deceased must not have arrived at the scene. This is because incident occurred at about 8.30 or 9.00 p.m. and although P.W.1 Vimal gave telephonic message to the parents of the deceased, parents were required to travel all the way upto Nasik from Dhule which is at a distance of about 150 kms. It is the claim of P.W.3 Sudhakar that he came to Nasik along with parents of accused. This fact is brought on record in

his cross-examination. Thus, he must have taken some time to hire vehicle to pick up the parents of accused and then travelled towards Nasik. On arrival at Nasik, he initially went to the residence of the accused where P.W.1 Vimal informed that victim was admitted to Birla Hospital and only thereafter the party went to Birla hospital. In any case, he could not have reached the hospital before commencement of the dying declaration at 00.05 hours. Thus, it can be safely said that by the time Special Executive Magistrate recorded the dying declaration of Hema, there was no possibility of Hema being tutored to inculpate the accused. If at all parents had reached before recording of Exhibit-40, there was another insulation against such tutoring. The parents of victim, had brought with themselves the parents of accused.

. Since Exhibit-40 is treated as F.I.R., as can be seen from the endorsement in the margin by the police station, that the same was registered as offence at 00.30 hours. Learned counsel for the appellant tried to gain ground by claiming that there was delay in dispatching the copy of the

F.I.R. to the Magistrate. This is because Shri.Mate claimed that he had given original dying declaration to police station and had sent the copy Exhibit-40-A immediately thereafter to the Magistrate. In fact record shows that the copy was so dispatched not before the lapse of 7 or 8 days and the same appears to have been received by the Magistrate on 27.9.1999, as can be seen from the envelop. No doubt, Procedure Code requires the police station to forward the copy of the F.I.R. immediately to the Magistrate. In this matter, Special Executive Magistrate has failed to do so and we do not have the details on record as to when the Police Station had forwarded the prescribed format of F.I.R. to the Magistrate. Such prompt dispatch to the Magistrate is important for ruling out the possibility of tampering of the F.I.R. and interested persons giving shape to the prosecution story as desired by them. In the matter at hands, such probability stands ruled out by the fact that the victim was alive for ten days after her statement was recorded. She was educated and she was B.A. and Bachelor of Library Science and she has signed Exhibit-40 in

English. If at all defence wishes to propound that dying declarations are subsequently recorded and those are tutored versions of Hema, defence will have to probabilise reasons for which Hema could be pursuaded to tell false inculpatory stories against her beloved husband and there are no grounds for such probability on record.

10. We are convinced that there is nothing on record which will compel us to look to the recording of statements of Hema by Special Executive Magistrate Shri.Mate and Police Inspector Shri.Pawar with suspicion or disbelief.

11. Exhibit-46 does not bear signature of Hema and learned counsel for the appellant was critical about the same. Certificate Exhibit-46 mentions more details than Exhibit-40. But the reasons are obvious. Shri.Pawar has recorded the same as statement during the course of investigation. Although he has taken all precautions which are required to be taken while recording dying declaration, by not obtaining signature of the maker of the statement, Shri.Pawar does not seem to have committed any

error. He commenced his deposition by pointing out that after registration of offence, investigation was entrusted to him vide communication dated Exhibit-44 which was accompanied by F.I.R. Exhibit-40. Absence of signature of Hema on Exhibit-46 is therefore, fully justified because Police Inspector Pawar being aware of fact that her statement was already recorded and treated as F.I.R., he was recording her additional statement as statement of witness during the course of investigation and Section 162 of the Code of Criminal Procedure mandates that the witness need not sign such statement. Due to this absence of signature, Exhibit-46 cannot be looked with disbelief. Exhibit-46 contains and mentions more details and background of the marital life, but same is not in conflict with Exhibit-40 so far as the core incident is concerned.

12. Learned counsel for the appellant tried to collect circumstances from all over the record and submits that a possibility of accused not being instrumental to set Hema on fire, is suggested by those circumstances. Both the dying

declarations Exhibits-40 and 46 do claim that accused tried to extinguish fire by pouring water upon the victim. P.W.1 Vimal has confirmed this position when she deposed that by the time she entered the flat, Hema although having suffered burn injuries, was drenched in water and there was water all over the floor. On reference to spot panchnama, it appears that water containers in both the rooms, were emptied. The learned counsel also pointed out that immediately after the incident, Hema gave telephone number of sister of accused and thus, she still had faith in the relatives of the accused. Because P.W.1 Vimal claimed that she knocked the door of the accused only when she was informed by couple of boys to have seen the fire in the flat of the accused, learned counsel submitted that Hema had raised no hue and cry. This submission is not sustainable in the light of contents in Exhibits-40 and 46 wherein Hema states that she had raised shouts. The shouts were not heard by P.W.1 Vimal because admittedly she was watching a T.V. programme with her family members.

. Although learned counsel for the appellant

tried to argue that Exhibit-46 is not admissible in evidence, such argument is not sustainable in the light of Section 32(1) of the Evidence Act, which reads as under:

> . "**When it relates to cause of death.--** When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question".

. Contents from the statement of a maker, when cause of death of the maker is in question, are admissible which relate to cause of death and transaction leading to cause of death. Having considered Exhibit-46 in the light of Section 32(1) practically all the details including background regarding conduct of the accused suggesting his suspicion about the character and

fidelity of the victim, would be admissible in evidence. In any case, the narration that husband had set her on fire and subsequently he tried to extinguish her, would be admissible. Although Exhibit-46 does not bear signature, P.I.Pawar who had heard Hema making statement is examined. Section 32(1) of the Indian Evidence Act, by itself does not lay down any mandate that statement of the maker, who is the deceased by the time evidence is recorded, ought to be reduced to writing. Oral dying declaration is not a rarity in criminal matters. The learned counsel also pointed out that accused himself had suffered burn injuries to his arms and this fact stands confirmed by the deposition of P.W.1 Vimal, who states that immediately after opening the door, accused pierced his arms into bucket of water.

. Certainly three circumstances, if considered by themselves, speak in favour of accused, but when considered together with other circumstances on record, those confirm the accused to be the author of the incident during which victim was set on fire. Attempt to extinguish fire was

delayed repentance.

. Admittedly accused and victim were the only family members. As rightly observed by the trial Court, the incident has occurred in the passage between bath room and kitchen. It has not occurred in the kitchen, which rules out the possibility of accident. It is not the case by accused that he tried to extinguish the fire by putting a quilt or chadder on victim or by bare hands. He has extinguished the fire by using the water and therefore, there was no reason for him to suffer burn of his hands while extinguishing the fire. The narration in Exhibits-40 and 46 regarding how she was set on fire as given by Hema perfectly matches the inference that initially accused himself set her on fire and lateron he extinguished her by using water. In the matter at hands, setting victim on fire is somewhat abnormal. Ordinarily the victim is set on fire by pouring kerosene and ignition by match-stick. In the matter at hands, it is the say of Hema that initially accused took out his own clothes, poured some kerosene on those and prepared the fire in the passage. Thereafter, he

poured remainder kerosene from the bottle on her person then he dragged her to the fire created by his own clothes and thus ensured that she caught fire. The manner in which the victim was set on fire, compelled the accused to grip her and keep her close to the fire created by his own clothes so that she should catch sufficient fire. It is this part of the incident during which he must have suffered burn injuries to his arms and not during the process of extinguishing the fire. Attempts to give history of accident on the part of the husband and history of attempt to suicide on the part of Manisha (sister of accused) further suggests that act of extinguishing fire was belated repentance. Last but not least, as already pointed out earlier, accused has not taken an opportunity to explain as to how Hema caught fire before he attempted to extinguish the same. He has not used his statement under Section 313 of Code of Criminal Procedure to explain the same, although an opportunity was afforded to, without running the risk of facing cross-examination. We are convinced that accused suffered burn injuries to his arms,inspite of the fact that fire was extinguished by using water,

is a clinching circumstance speaking against the accused in the strongest possible manner than any other circumstances on record. We are therefore, not inclined to accept the submission of the learned counsel that circumstances on record suggest victim having caught fire otherwise than homicidal attempt on the part of accused or that accused being innocent, because he extinguished the fire.

13. Having accepted the conclusion that accused set Hema on fire, the submission of the learned counsel that there was no intention to kill, is required to be rejected in view of the observations of the Supreme Court in the matter of **Virsa Singh Vs. State of Bihar reported in A.I.R.1958 S.C.Page 465.**

14. For the reasons discussed hereinabove, the appeal merits dismissal and is accordingly dismissed. We confirm the judgment and order delivered by 1st Ad-hoc Additional Sessions Judge Nasik on 17.8.2001 in Sessions Case No. 25 of 2000.

. The Registrar (Judicial) shall furnish a certified copy of this judgment, free of costs, to the accused in person through prison authorities.

[N.V.DABHOKAR, J.]

[SMT.V.K.TAHLRAMANI,J.]